

BOARD FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS

INITIAL STATEMENT OF REASONS

Hearing Date: No hearing scheduled.

Subject Matter of Proposed Regulations: Definitions of “negligence,” “incompetence,” “electrical engineering,” and “mechanical engineering”

Section Affected: Title 16, California Code of Regulations section 404

Specific Purpose of each adoption, amendment, or repeal:

The specific purpose of this proposal is to amend Section 404 of Title 16 of the California Code of Regulations to:

1. add definitions of the terms “negligence” and “incompetence” as they are used in Business and Professions Code sections 6775 and 8780 for administrative disciplinary purposes; and,
2. conform the definitions of “electrical engineering” and “mechanical engineering” to recent statutory changes. [This is a change without regulatory effect.]

Factual Basis

Factual basis for determination that each proposed change is necessary:

1. Definitions of “negligence” and “incompetence”
The Board is mandated to protect the public health, safety, welfare, and property by investigating complaints and pursuing disciplinary actions against licensees who have violated the Professional Engineers Act (Business and Professions Code section 6700, et seq.) and the Professional Land Surveyors’ Act (Business and Professions Code section 8700, et seq.). Two possible violations of these Acts are negligence and incompetence in the practices of professional engineering and professional land surveying. However, the terms “negligence” and “incompetence” as used in Sections 6775 and 8780 are not currently defined in either statute or regulation. Because they are not specifically defined in statute or regulation, many licensees and consumers do not understand what these terms mean and that these terms have different meanings when applied to administrative disciplinary actions as opposed to civil tort litigation. Defining these terms as they are specifically used in Sections 6775 and 8780 for administrative disciplinary actions will provide clarity for the licensees and the consumers, which in turn will make the Board more effective in carrying out its mandate of consumer protection. Additionally, the Joint Legislative Sunset Review Committee (JLSRC) has recommended that the Board define these terms, either on their own in statute or regulation or as part of a Code of Professional Conduct. The Board has

determined that the most appropriate place for the definitions of these terms is in the existing regulation that contains the definitions of other terms used in the Acts and regulations.

2. Definitions of “electrical engineering” and “mechanical engineering”

Currently, 16 CCR §404 contains definitions of “electrical engineering” and “mechanical engineering.” However, effective January 1, 2001, these definitions were moved into statute (Business and Professions Code sections 6731.5 and 6731.6, Stats. 2000, Ch. 1006 (S.B. 2030)) and B&P Code §6717 was amended so that the Board is prohibited from defining “electrical engineering” and “mechanical engineering” in regulation. This proposal would amend the regulatory definitions to refer to the appropriate statutes. This is simply a conforming change without regulatory effect.

Underlying Data

Technical, theoretical or empirical studies or reports relied upon (if any):

1. Definitions of “negligence” and “incompetence”

- A. 1999 Joint Legislative Sunset Review Committee (JLSRC) recommendation (specifically Page 8)
- B. Agenda Item and Minutes from the December 16-17, 1999, Board meeting
- C. Minutes from the February 24, 2000, Enforcement Committee meeting
- D. Agenda Item and Minutes from the April 6, 2000, Enforcement Committee meeting
- E. Agenda Item and Minutes, including a handout from Liaison Deputy Attorney General (DAG) Susan Ruff, from the May 31, 2000, Enforcement Committee meeting
- F. Agenda Item and Minutes, including two handouts from the Consulting Engineers and Land Surveyors (CELSOC), from the July 27, 2000, Enforcement Committee meeting
- G. Minutes from the July 27-28, 2000, Board meeting
- H. Minutes from the October 19, 2000, Enforcement Committee meeting
- I. Agenda Item and Minutes from the January 24-25, 2002, Board meeting
- J. Agenda Item and Minutes, including a handout from Charles Greenlaw, S.E., from the March 7-8, 2002, Board meeting
- K. Agenda Item, including a letter from DAG Ruff, and Draft Minutes from the April 25-26, 2002, Board Meeting
[NOTE: It is anticipated that these Draft Minutes will be approved by the Board at its June 13-14, 2002, meeting with no changes. The final, approved minutes will be included in the final rulemaking file. Should any substantive changes be made to the Draft Minutes prior to approval, the addition of such modified minutes to the rulemaking file would be noticed for public comment.]

2. Definitions of “electrical engineering” and “mechanical engineering”

- L. Senate Bill 2030, Chapter 1006, Statutes of 2000

Business Impact

This regulation will not have a significant adverse economic impact on businesses.

Specific Technologies or Equipment

This regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the board/bureau/commission/program would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.

Set forth below are the alternatives which were considered and the reasons each alternative was rejected:

1. Definitions of “negligence” and “incompetence”
 - A. One alternative would be to allow the confusion regarding the definitions of “negligence” and “incompetence” as used in Sections 6775 and 8780 for the purpose of administrative disciplinary actions to continue and to hope that case law would some day be established to define both of these terms specifically for the purpose of administrative disciplinary actions. This alternative is not fair to the licensees or the consumers and could hinder the Board in meeting its mandate to protect the public health, safety, welfare, and property. In addition, this alternative would be in conflict with the directives of the JLSRC that the Board should define these terms.
 - B. A second alternative would be to use the definition of “negligence” that is used in civil tort law or in the BAJI jury instructions, as has been recommended by the professional association Consulting Engineers and Land Surveyors of California (CELSOC) and by Charles Greenlaw, Structural Engineer; this definition requires harm or injury to have occurred to an individual as a result of a person’s failure to use due care. However, this definition is completely inappropriate for use in administrative disciplinary matters before a licensing agency. The reason such a definition is completely inappropriate is that tort law and administrative licensing law serve different purposes. The purpose of tort law is to redress wrongs that have been done to an individual and to make that individual whole through the payment of monetary damages; tort law assumes that injury has been done to an individual and that the actions of the person being sued have caused that injury to occur; therefore, tort law can be described as retrospective – it involves wrongs that have already occurred. The purpose of licensing law, and administrative disciplinary action against licensees, is to protect the public. Instead of redressing a wrong that has already been done, licensing agencies attempt to protect

consumers from future harm by a licensee; therefore, the work of licensing agencies can be thought of as prospective.

- C. A third alternative would be to include the definitions of “negligence” and “incompetence” in the Codes of Professional Conduct regulations currently being promulgated by the Board, as allowed for by the JLSRC in its recommendations and has been recommended by Mr. Greenlaw. After reviewing the Codes of Professional Conduct and Codes of Ethics of other professions and other states’ professional engineering and land surveying licensing agencies and after reviewing the existing laws under the Board’s jurisdiction, the Board has decided that the most appropriate place for the definitions of “negligence” and “incompetence” would be in 16 CCR §404, since that regulation contains the definitions of numerous words and phrases that are used in the Professional Engineers Act, the Professional Land Surveyors’ Act, and the Regulations of the Board, and “negligence” and “incompetence” are words used in the Acts.

2. Definitions of “electrical engineering” and “mechanical engineering”

Since the proposed changes regarding the definitions of “electrical engineering” and “mechanical engineering” are simply being made to conform the definitions to statute and are changes without regulatory effect, there is no other alternative.